

## **REMARKS**

The Applicant appreciates the courteous and complete examination of the application by the Examiner. In view of the foregoing amendments and the following remarks, a reconsideration of the instant application is respectfully requested.

In order to expedite the prosecution of this application, claims 1-8 have been amended, and claims 9-11 have been added to more completely cover certain aspects of the Applicant's invention. Claims 1-11 are now in this application.

### **Regarding the Claim Objections**

The Examiner objected to claims 4-8 under 37 CFR 1.75(c) as being in improper form because a multiple dependent claim from any other multiple dependent claim. Claims 4-8 have been amended to remove all multiple dependent claim language, thereby overcoming the Examiner's objection and putting claims 4-8 in condition for treatment on the merits.

### **Regarding the Claim § 112 Rejections**

The Examiner rejected claim 1 under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1 has been amended to cancel the language "should be", and further describing the probe as a "heated zirconium oxide sensor type" having a "response time less than ten seconds". The Applicant believes that amended claim 1 clearly and distinctly claims the subject matter which the applicant regards as the invention.

### **Regarding the Claim § 103 Rejections**

The Examiner rejected claims 1-3 under 35 U.S.C. 103(a) as being unpatentable over Schneider in view of Katz. The Applicant appreciates the time and effort the Examiner took in finding these prior art references.

Both the Schneider and Katz references do not disclose, teach, or suggest the use of a "heated zirconium oxide sensor" as the gas measurement probe. Since all of the prior art references relied upon by the Examiner do not disclose, teach, or suggest

the use of this limitation, then it can be appreciated that it would not have been obvious to one skilled in the art to use a heated zirconium oxide sensor in combination with the other components of the invention of amended claim 1.

Additionally, as the Katz reference does disclose "a screen 48 is placed over each opening 44 to assist in precluding such fouling" as an air intake strainer but it is not located at the end of the rod. The screens (48) of the Katz reference each cover an upwardly facing opening (44) communicating with an aperture (38). The apertures (38) are perforations located on a tubular member having a tubular wall (36) and are "spaced axially along a lower portion 39 of tubular wall 36" [Figures 2 and 3; col. 3 lines 17-27]. It can be appreciated the Katz reference actually teaches away from the air intake strainer located at the end of the rod of amended claim 1, since the screens (48) are specifically located and spaced axially along the tubular wall (36) and not at the end of the tubular wall. Furthermore, the Katz reference specifically describe the lowermost end (46) of the draw tube (32) as being "rounded" with no suggestion of having an intake screen or opening.

However, as the Supreme Court recently explained "a patent composed of several elements is not proved obvious merely by demonstrating that each element was, independently, known in the prior art." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S., 82 U.S.P.Q.2d 1385, 1396 (2007). Moreover, "[r]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *Id.* (citing *In re Kahn*, 441 F. 3d 977, 988 (Fed. Cir. 2006). "To facilitate review, this analysis should be made explicit." *Id.* Furthermore, "[a] factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of arguments reliant upon ex post reasoning. See *Graham*, 383 U. S., at 36 (warning against a 'temptation to read into the prior art the teachings of the invention in issue' and instructing courts to 'guard against slipping into the use of hindsight' (quoting *Monroe Auto Equipment Co. v. Heckethorn Mfg. & Supply Co.*, 332 F. 2d 406, 412 (CA6 1964)))." *Id.* at, 82 U.S.Q.P.2d at 1397.

The Applicant requests that the Examiner reconsiders his rejections of the invention in view of the well established principle that small differences in a crowded art

can constitute patentable improvement. See *In re Baum*, 51 USPQ 470 (CCPA 1941) and *In re Lange*, 126 USPQ 365 (CCPA 1960). In considering this principle, the Applicant would also request that the Examiner take note to the court decision which notes that "apparent simplicity has been held to furnish strong argument for patentability where, as here, a need has existed for a structure of the nature disclosed and claimed. The fact that a solution to a problem is simple, or appears to be simple when viewed in retrospect, does not mean that the solution was obvious when it was conceived." See *Ellipse corp. v. Ford Motor Co.*, 171 USPQ 513.

Moreover, the law is clear that a motivation must be provided by the prior art to make the allegedly obvious combinations of parts relied upon in making an obviousness rejection. Our case law makes clear that the best defense against the subtle but powerful attraction of a hindsight-based obviousness analysis is rigorous application of the requirement for a showing of the teaching or motivation to combine prior art references. See, e.g., *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 140, 1352, 48 USPQ2d 1225, 1232 (Fed. Cir. 1998). And, absent such a showing of motivation in the prior art to make the allegedly obvious combination, it can only be assumed that the applicant's disclosure has provided the motivation for making the combination of elements from the prior art, and not the prior art itself.

Combining prior art references without evidence of such a suggestion, teaching, or motivation simply takes the inventor's disclosure as a blueprint for piecing together the prior art to defeat patentability -- the essence of hindsight. See e.g., *Interconnect Planning Corp. v. Feil*, 774 F.2d 1132, 1138, 227 USPQ 543, 547 (Fed. Cir. 1985).

It is therefore submitted that the combination of individual parts taught by the various prior art references relied upon in the Office Action would not motivate one skilled in the art to arrive at the applicant's claimed invention.

Claims 2-8 are felt to patentably distinguish over the prior art references because of their above-mentioned dependency from amended claim 1.

Regarding claim 3, the Examiner states that the Katz reference "clearly teaches that the sampling rods are connected to the pipe using a coupling. Claim 3 has been amended to remove the "coupling" limitation, thereby overcoming this rejection. The

"packing gland" limitation of amended claim 3 is not disclosed, taught, or suggested in either the Schneider or the Katz references.

### **Regarding the Newly Added Claims**

The Applicant respectfully adds claims 9-11 which more completely cover certain aspects of the Applicant's invention. Independent claim 9 includes all the believed allowable subject matter of amended claim 1, plus further adds the believed allowable limitations of amended claim 3 and 5. The Schneider and Katz references do not disclose, teach, or suggest the use of a temperature probe connected to the program controller in combination with of an input/output port enabling the program controller to receive PT 100 or PT 1000-type signals. Claims 10 and 11 are felt to patentably distinguish over the prior art references because of their above-mentioned dependency from claim 9.

Although the present communication may include alterations to the application or claims, or characterizations of claim scope or referenced art, the Applicant is not conceding in this application that previously pending claims are not patentable over the cited references. Rather, any alterations or characterizations are being made to facilitate expeditious prosecution of this application. The Applicant reserve the right to pursue at a later date any previously pending or other broader or narrower claims that capture any subject matter supported by the present disclosure, including subject matter found to be specifically disclaimed herein or by any prior prosecution. Accordingly, reviewers of this or any parent, child or related prosecution history shall not reasonably infer that the Applicant has made any disclaimers or disavowals of any subject matter supported by the present application.

Applicant has endeavored to address all of the Examiner's concerns as expressed in the Office Action. Accordingly, amendments to the claims, the reasons therefor, and arguments in support of patentability of the pending claim set are presented above. Any claim amendments which are not specifically discussed in the above-remarks are made in order to improve the clarity of claim language, to correct grammatical mistakes or ambiguities, and to otherwise improve the clarity of the claims

to particularly and distinctly point out the invention to those of skill in the art. Finally, Applicant submits that the claim limitations above represent only illustrative distinctions. Hence, there may be other patentable features that distinguish the claimed invention from the prior art.

With the above amendments being fully responsive to all outstanding rejections and formal requirements, it is respectfully submitted that the claims are now in condition for allowance, and a notice to that effect is earnestly solicited. Should the Examiner feel that there are further issues which might be resolved by means of telephone interview, the Examiner is cordially invited to telephone the undersigned at (403) 444-5695, or email at davidguerra@internationalpatentgroup.com

No additional fee is due.

Respectfully Submitted,

/David A. Guerra/

David A. Guerra  
Registration No.: 46,443  
Customer No.: 29,689

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On (Date) 04/07/2008 by David A. Guerra /David A. Guerra/